No. 15,929

United States Court of Appeals

For the Ninth Circuit

JAMES HENRY AUDETT,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

Appeal from the United States District Court for the District of Idaho, Central Division.

APPELLANT'S PETITION FOR A REHEARING.

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To the Honorable Chief Judge, and to the Honorable Associate Judges of the United States Court of Appeals for the Ninth Circuit:

STATEMENT.

Appellant was charged by two counts of an indictment with the violation of two subsections of 18 U.S.C. Section 2113. Count I charged a violation of subsection (a), entry of a bank with intent to commit larceny. Count II charged a violation of subsection (b), grand larceny. He was convicted on both counts and sentenced on Count I to 20 years imprisonment and on Count II to 10 years. This Honorable Court, assiduous in its pursuit of justice, discovered and held as error the imposition of two sentences for one offense. This Court further determined that the sentence on Count II became merged in the sentence on

Count I and modified the judgment by striking therefrom the sentence imposed on Count II.

Appellant respectfully urges that justice would be accorded him on this point, if this Court would hold that:

1. The sentence on Count I was merged in Count II; and

2. The cause is reversed and remanded to the District Court for redetermination of appellant's sentence.

SUMMARY OF ARGUMENT.

Appellant contends that a rehearing should be granted because:

1. The sentence on Count I was merged in the sentence on Count II.

2. The cause should be reversed and remanded to the District Court for redetermination of appellant's sentence.

ARGUMENT.

I.

THE SENTENCE ON COUNT I WAS MERGED IN THE SENTENCE ON COUNT II.

A. The sentence on Count I should be merged in the sentence on Count II because Count II charges the more aggravated offense.

Count II charges the actual commission of a larceny and therefore defines an offense more serious than

Count I which charges an entry with intent to commit a larceny.

Many Courts have held that where a defendant has committed but one offense and has been sentenced erroneously under more than one subsection of Section 2113, that he may be sentenced only for the more aggravated crime.

In *Wilson v. United States* (Ninth Circuit), 145 Fed. 2d 734, the defendant had been convicted on Count I of a violation of subsection (a) of Section 588 (the predecessor to present Section 2113) and on Count II of subsection (b) of Section 588. The Court held that the two counts charged a single offense and further held as follows:

> "Since Count 2 charged aggravating circumstances and Count 1 did not, appellant should have been sentenced on Count 2 and should not have been sentenced on Count 1."

In *Wells v. Swope,* 121 Fed. Supp. 718, the defendant had been sentenced under Count 1 for 20 years for entering the bank with intention to commit a felony and on Count 2 to 25 years for armed robbery, the sentences to run consecutively. The Court held that the first charge merged into the second charge and that the sentence on Count 1 was void. This case was subsequently reversed by *Madigan v. Wells,* 224 Fed. 2d 577 on the ground that the lower Court had no jurisdiction to issue the writ of habeas corpus.

See also:

United States v. Harris, 97 Fed. Supp. 154;
United States v. Tarricone, 242 Fed. 2d 555;

United States v. Nirenberg, 242 Fed. 2d 632;
United States v. DiCanio, 245 Fed. 2d 713.

Prince v. United States, 352 U.S. 322, 328, held that Congress intended in Section 2113 as follows:

> ". . . that the unlawful entry provision was inserted to cover the situation where a person enters a bank for the purpose of committing a crime, that is frustrated for some reason before completing the crime. The gravamen of the offense is not in the act of entering, which satisfies the terms of the statute even if it is simply walking through an open, public door during normal business hours. Rather the heart of the crime is the intent to steal. This mental element merges into the completed crime if the robbery is consummated. . . ."

B. Congress must have intended that the maximum sentence imposable for entering a bank with intent to commit larceny should be no greater than the maximum sentence imposable for the actual commission of the crime of larceny.

Subsection (a) of Section 2113 includes both the crime of entry of a bank with intent to commit larceny and entry of a bank with the intent to commit robbery. The maximum sentence for violation of subsection (a) (20 years) is the same maximum sentence for the actual commission of the crime of robbery. The maximum sentence for the actual commission of the crime of larceny is 10 years. Clearly, the crime of robbery carries a heavier penalty than larceny because it is a more serious crime. Even though the robbery is not consummated, Congress intended the penalty to be the same as if it had been consummated. *Prince v. United States,* 352 U.S. 322. Congress

could not have intended the incongruous result that a larceny not consummated carries a penalty *double* the penalty incurred where a larceny is consummated.

II.

THE CASE SHOULD BE REMANDED TO THE DISTRICT COURT WITH DIRECTIONS TO REDETERMINE THE SENTENCE WITHIN THE MAXIMUM ALLOWED PERIOD.

Where the District Court has improperly sentenced a defendant under two subsections of Section 2113, the cause should be remanded to the trial Court to redetermine the sentence.

United States v. Williamson, 255 Fed. 2d 512;
Prince v. United States, 352 U.S. 322, 329;
Wilson v. United States, 145 Fed. 2d 734;
United States v. Harris, 97 Fed. Supp. 154.

It is respectfully submitted that a rehearing should be granted and that the judgment herein should be reversed and remanded to the District Court for resentencing on Count II of the indictment.

Dated, San Francisco, California,
April 24, 1959.

THOMAS M. JENKINS,
LESLIE GENE MACGOWAN,
Attorneys for Appellant and Petitioner.

Certificate of Counsel

I hereby certify that I am of counsel for appellant and petitioner in the above entitled cause and that in my judgment the foregoing petition for a rehearing is well founded in point of law as well as in fact and that said petition for a rehearing is not interposed for delay.

Dated, San Francisco, California,
April 24, 1959.

Thomas M. Jenkins,
Of Counsel for Appellant and Petitioner.